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James A. Byrne U.S. Courthouse  
Via videoconference  
July 9, 2020  
Commencing at 1:40 p.m.

APPEARANCES:

FOR STATE ATTORNEY GENERAL'S OFFICE - ELM  
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1 addressing class certification on an overarching conspiracy  
2 case, whereas the current recommendation does not address class  
3 certification on an overarching conspiracy case.

4 But we think that's a significant issue in this  
5 litigation that Your Honor should entertain.

6 THE COURT: Thank you.

7 MR. KORPUS: And I did neglect to say -- I'm sorry.

8 THE COURT: Go ahead.

9 MR. KORPUS: I did neglect to mention on the  
10 individual conspiracy cases that were proposed by the private  
11 plaintiffs, it is our view that in trying an overarching  
12 conspiracy case, by definition, you also need to try the  
13 individual conspiracies as part of that conspiracy.

14 So we think you would be informing the parties of the  
15 risk and rewards of those alleged conspiracies by trying the  
16 overarching cases.

17 And you did receive a letter concerning pravastatin in  
18 particular from Glenmark, I believe. I don't know if you saw  
19 that.

20 THE COURT: I did. I did.

21 One second.

22 You mentioned Glenmark. I was going to bring that up.

23 Glenmark had a letter submitted that I already knew  
24 the situation because DOJ did inform the Court, I guess it was  
25 yesterday, might have been the day before, concerning a new

1 indictment here in the EDPA concerning Glenmark, also filed and  
2 assigned to Judge Barclay Surrick, a colleague on this court  
3 who is handling the other indictments in this area and nature.

4 And I don't have any other information. That is  
5 public. It's been filed. It's a grand jury indictment, so it  
6 is not private or confidential information any longer.

7 And of course I understand that in any case where  
8 indictment might be pending or investigation is pending,  
9 there's always Fifth Amendment considerations. But for  
10 example, we know that we can work through some of those.  
11 Whether you agree with a special master or whether I have to  
12 rule on it, there's a way to do that ad hoc, case by case. I  
13 see no reason that is a blanket stay on any discovery and even  
14 motions practice if that's the case.

15 I want you to know that at this point, in all the  
16 years of investigation, there can't possibly be a stay of all  
17 civil litigation, unless it's really so permeated that nothing  
18 can happen. And I don't know that yet. So I wouldn't be  
19 granting a stay on any particular cases right now just because  
20 there are indictments and convictions in some of those cases.

21 MR. KORPUS: We understand, Your Honor. We are  
22 talking about a selection of bellwether and not a stay, which I  
23 think raises different considerations.

24 THE COURT: Yes, it does. But I thought I should  
25 bring that up so everyone could know what I was thinking.

1           And someone on the telephone does want to speak.

2           Who is it?

3           MR. REED: Your Honor, forgive me for interrupting.

4           It's Steve Reed on behalf of Glenmark.

5           THE COURT: You are not interrupting. I'm welcoming  
6 your interruption.

7           Yes?

8           MR. REED: I did speak over people and I apologize.

9           So Your Honor, I appreciate the opportunity to address  
10 the issue.

11           First, one point of clarification, there is no grand  
12 jury indictment. DOJ chose to proceed by way of information.

13           That's an issue that was raised with Judge Surrick and --

14           (Court reporter clarification.)

15           THE COURT: We're going to move up the volume and ask  
16 you to repeat that because I do think it's important.

17           You didn't have much after that, did you?

18           If that's an information, my understanding of the  
19 filing of informations is that's by consent. Otherwise, you  
20 have to get a grand jury.

21           MR. REED: Your Honor, that's Glenmark's understanding  
22 to be well. But to be clear, Glenmark did not consent to  
23 proceed by way of information. So that is an issue that we  
24 have raised and intend to address with Judge Surrick.

25           It's not, Your Honor, I think germane to the issue

1 that we're discussing here, but I did want to be clear on the  
2 record.

3 THE COURT: You're right. It's not germane to  
4 Lexecon. And thank you, Mr. Reed.

5 I do think it's an anomaly, and Judge Surrick is going  
6 to figure that one out.

7 MR. REED: Your Honor, if I may continue, just for a  
8 moment.

9 THE COURT: Yes, Mr. Reed.

10 MR. REED: It's Steve Reed.

11 On the other point, we appreciate and obviously we'll  
12 respect your guidance on a stay.

13 Just to be clear, Glenmark is not at this time seeking  
14 a stay. We thought it was important to call this issue here to  
15 your attention promptly as you're considering the selection of  
16 bellwethers for the reasons set forth in my letter, and I'm  
17 happy to elaborate. We think the fact that there is a criminal  
18 proceeding, given the Fifth Amendment concerns that you  
19 recognize, concerns about expanding the scope of criminal  
20 discovery and the limits of Rule 16(b) of the Rules of Criminal  
21 Procedure but with parallel civil issues, for a host of  
22 reasons, we think pravastatin is an unsuitable and equally  
23 wrong choice as a bellwether.

24 Although that's the point we wanted to raise this  
25 development with you as you consider choosing among the various

1 options for bellwethers, we respectfully submit that  
2 pravastatin should not be a bellwether for the reasons we've  
3 stated.

4 THE COURT: Thank you, Mr. Reed. You did state very  
5 clearly in your letter that you were not seeking a stay on  
6 behalf of Glenmark to stay all proceedings. And you copied  
7 this to many other counsel, plaintiffs, defense, special  
8 masters, so I wasn't worried about bringing this up.

9 But it brings to mind the number of opportunities  
10 there are to -- roadblocks in terms of depositions primarily  
11 and other types of discovery.

12 And I know that Special Master Merenstein has dealt  
13 with a few of these.

14 I do think that we can do with a few less of those  
15 roadblocks by carefully choosing bellwethers. But in no way,  
16 shape or form does the selection of bellwether trials create a  
17 pass or an unofficial stay for any other case. Discovery is to  
18 not just commence but to be vigorously sought in as many cases  
19 as possible, in as comprehensive and consolidated a way as  
20 possible.

21 So we are happy that -- to receive the information  
22 that you imparted, Mr. Reed. And we will certainly consider  
23 your request not to include Glenmark in a bellwether, not at  
24 this moment, anyway.

25 Thank you.

1 And was there another person on the telephone --

2 Was there another person on the telephone?

3 MR. DeMATTEO: Yes, Your Honor. This is Tom DeMatteo  
4 from DOJ.

5 THE COURT: Oh, I didn't know you were on the phone.  
6 I would have called on you earlier.

7 MR. DeMATTEO: No problem. I just wanted to confirm  
8 that it was an information and also just to reiterate DOJ's  
9 position as we filed our statement of interest back in March.  
10 We don't take a position on what the best case for the  
11 bellwether is. And the parties can keep with discovery to  
12 prioritize depositions unaffected by the stay. You know, any  
13 bellwether selected should be able to progress efficiently.

14 THE COURT: Thank you. I think that's clear. Thank  
15 you very much.

16 MR. DeMATTEO: You're welcome, Your Honor.

17 THE COURT: Now we'll go back to you, Mr. Istvan.

18 MR. ISTVAN: I just wanted to respond briefly about  
19 Glenmark.

20 We don't think that the information against Glenmark  
21 changes the suitability of pravastatin as a bellwether at all.

22 As you know, the DOJ investigation is ongoing. The  
23 next DOJ information or indictment could easily involve one of  
24 the other single drug cases that are pending here. So the fact  
25 that pravastatin has now been selected and identified as one in

1 which there was criminal wrongdoing doesn't seem to me to  
2 change anything.

3 We briefed fairly extensive the individual defendants'  
4 arguments because of the potential of criminal indictment they  
5 should not have to participate in a bellwether.

6 The same arguments apply to Glenmark. They don't get  
7 a pass on civil litigation or a delay on civil litigation  
8 simply because they might get indicted or that there's an  
9 information. Right? All of the defendants are in that same  
10 situation. They all might get indicted. There might be an  
11 information against any of them.

12 And then with respect to Glenmark's witnesses, there  
13 are some Glenmark witnesses. There are some witnesses from  
14 every defendant that are on the DOJ's list that they want  
15 deferred.

16 The pravastatin information didn't change anything on  
17 that list. They're all the same witnesses. No one has been  
18 added or subtracted. If anything, it's possible that the  
19 pravastatin -- the DOJ's pravastatin piece may go faster than  
20 the others.

21 And also there's another defendant, Apotex, which has  
22 been the subject of DOJ investigation and action. And Apotex  
23 has a deferred prosecution agreement on pravastatin and has  
24 admitted liability.

25 And therefore, it's possible -- it's possible, right,



1 that more witnesses might actually testify on pravastatin than  
2 on some of the other drugs, because certain defendants'  
3 liability with respect to the criminal investigation has  
4 already been determined on pravastatin. So we think if  
5 anything, the argument in favor of pravastatin is stronger now  
6 that the case is more developed with the DOJ and there's less  
7 uncertainty.

8 THE COURT: Thank you. I appreciate your comments.

9 MR. REED: Your Honor, may I address -- Steve Reed  
10 again. May I address that briefly?

11 THE COURT: Yes. Mr. Reed and then to you, Mr.  
12 Blechman.

13 MR. REED: I shouldn't have to say this, but it sounds  
14 like I need to.

15 The fact that there is an information filed means  
16 there are allegations of wrongdoing. There's no evidence of  
17 criminal conduct with respect to pravastatin or otherwise.  
18 These are allegations. They overlap with the allegations in  
19 the civil claims, and that's precisely why we believe that  
20 pravastatin is a poor choice as a bellwether.

21 Glenmark is not looking for any kind of pass in this  
22 MDL. We expect to participate in discovery as we have been.  
23 We're talking rather specifically about a product that is  
24 directly at issue in a criminal proceeding. It's customary, as  
25 I'm sure Your Honor knows. You have discretion when -- it is

1 not unusual for a judge who is presiding over a civil matter to  
2 allow the criminal matter to proceed first for pretty obvious  
3 concerns. But again, what we're -- we're not asking for a  
4 stay. We're suggesting that there are a number of choices the  
5 Court has as bellwethers. I'm not going to reargue this point,  
6 which have been briefed extensively and argued extensively.  
7 But as you consider which would be the most productive,  
8 informative bellwethers to move this MDL along, I would  
9 respectfully submit that pravastatin shouldn't be among them,  
10 because it presents unique challenges. Right now the fact that  
11 other criminal informations or indictments might be filed in  
12 the future is a fact that we all have to deal with. But why  
13 would the Court want to buy into a known problem now because of  
14 the concerns about the potential but unknown problems in the  
15 future.

16 THE COURT: Thank you, Mr. Reed.

17 Mr. Blechman?

18 MR. BLECHMAN: Yes, Your Honor. Thank you, very much.  
19 I had my phone on mute before when plaintiffs were speaking. I  
20 didn't figure out how to unmute it in time, so thank you for  
21 the opportunity.

22 I wanted to note in connection with the bellwethers  
23 the special master's report and recommendation notes on page 4,  
24 Footnote 4, that the Kroger Direct Action Plaintiffs, which  
25 include Kroger, Albertsons and HEB, all of whom have a